

IN THE SUPREME COURT OF IOWA
SUPREME COURT NO. 16-0624
JOHNSON COUNTY EQUITY NO. EQCV074310
FIRST AMERICAN BANK AND C.J. LAND, L.L.C.,
Plaintiffs/Appellees

VS.

FOBIAN FARMS, INC.; HOOVER HIGHWAY BUSINESS PARK, INC.;
GATEWAY, LTD.; GATEWAY PROPERTIES, LTD.;
Defendants/Appellants

GATEWAY COMMERCIAL CONDOMINIUMS OWNERS
ASSOCIATION; JERRY L. EYMAN; AND JAN G. EYMAN,
Defendants

FOBIAN FARMS, INC.,
Cross-Claimant,

VS.

JERRY L. EYMAN; GATEWAY COMMERCIAL CONDOMINIUMS
OWNERS ASSOCIATION,
Cross-Claim Defendants.


Appeal from the Iowa District Court for Johnson County
The Honorable Ian K. Thornhill, Judge

APPELLANTS' FINAL BRIEF
AND
REQUEST FOR ORAL ARGUMENT

Gregg Geerdes
Dey Building
105 Iowa Avenue, Suite 234
Iowa City, Iowa 52240
(319) 341-3304 Telephone
(319) 341-3306 Fax
ATTORNEY FOR APPELLANTS

PROOF OF SERVICE AND CERTIFICATE OF FILING

I certify that on the 16th day of September, 2016, I electronically filed the foregoing with the Clerk of Court for the Supreme Court of Iowa. I certify that all participants in the case are registered electronic filing users and that service will be accomplished by the electronic filing.



GREGG GEERDES
Dey Building
105 Iowa Avenue, Suite 234
Iowa City, Iowa 52240
(319) 341-3304 Telephone
(319) 341-3306 Fax
ATTORNEY FOR APPELLANTS

TABLE OF CONTENTS

PROOF OF SERVICE AND CERTIFICATE OF FILING.....	i
TABLE OF CONTENTS.....	ii
TABLE OF AUTHORITIES.....	iii
STATEMENT OF THE ISSUE PRESENTED FOR REVIEW.....	1
STATEMENT OF THE CASE.....	2
ARGUMENT.....	12
I. THE TRIAL COURT ERRED IN DETERMINING THE AMOUNT OF THE SANCTION TO BE ASSESSED AGAINST THE FOBIAN DEFENDANTS.....	12
A. Standard of Review and Issue Preservation.....	12
B. Argument.....	13
1. The Trial Court erred in concluding that the entire amount of C.J. Land's and First American Bank's litigation expenses was recoverable.....	13
2. The Trial Court made findings in support of sanctions which were not supported by substantial evidence.....	21
3. The Trial Court erroneously calculated the amount that was needed to deter.....	25
4. The Trial Court improperly considered the letter written by Fobian.....	26
CONCLUSION.....	28
REQUEST FOR ORAL ARGUMENT.....	28
CERTIFICATE OF COMPLIANCE.....	29

TABLE OF AUTHORITIES

<u>Cases</u>	<u>Page</u>
<u>Barnhill v. Iowa District Court for Polk County</u> , 765 NW2d 267 (Iowa 2009).....	16, 17, 18, 19, 25
<u>Bertrand v. Mullin</u> , 846 NW2d 884 (Iowa 2014).....	27
<u>Bodenhamer Bldg. Corp. v. Architectural Research Corp.</u> , 989 F.2d 213 (6 th Circ. 1993).....	14, 19, 24
<u>Brown v. District Court of Webster County</u> , 158 NW 2d 744 (Iowa 1968).....	26, 27
<u>Everly v. Knoxville Community School District</u> , 774 NW2d 488 (Iowa 2009).....	14, 21, 24
<u>In Re. Kunstler</u> , 914 F.2d 505 (4 th Circ. 1990).....	14, 24
<u>Kufer v. Carson</u> , 230 NW2d 500 (Iowa 1979).....	20
<u>Mathias v. Glandon</u> , 448 NW2d 443 (Iowa 1989).....	21
<u>Rowedder v. Anderson</u> , 814 NW2d 585 (Iowa 2012).....	12, 14, 22, 24, 25
<u>Schettler v. Iowa District Court</u> , 509 NW2d 459 (Iowa 1993).....	12, 24, 26
<u>Weigel v. Weigel</u> , 467 NW2d 277 (Iowa 1991).....	20, 27
 <u>Rules And Other Authority</u>	
Mark S. Cady, <u>Curbing Litigation Abuse and Misuse: A Judicial Approach</u> , 36 Drake L. Rev. 483 (1986-87).....	14, 24
Article I, Section 7 Constitution of the State of Iowa.....	27
First Amendment, Constitution of the United States.....	27

Iowa Rule of Civil Procedure 1.413.....2, 4, 12, 14, 18, 21, 22, 26

STATEMENT OF THE ISSUE PRESENTED FOR REVIEW

I. THE TRIAL COURT ERRED IN DETERMINING THE AMOUNT OF THE SANCTION TO BE ASSESSED AGAINST THE FOBIAN DEFENDANTS

Rowedder v. Anderson, 814 NW2d 585 (Iowa 2012)

Schettler v. Iowa District Court, 509 NW2d 459 (Iowa 1993)

Iowa Rule of Civil Procedure 1.413

Everly v. Knoxville Community School District, 774 NW2d 488 (Iowa 2009)

Bodenhamer Bldg. Corp. v. Architectural Research Corp., 989 F.2d 213 (6th Circ. 1993)

In Re. Kunstler, 914 F.2d 505 (4th Circ. 1990)

Mark S. Cady, Curbing Litigation Abuse and Misuse: A Judicial Approach, 36 Drake L. Rev. 483 (1986-87)

Barnhill v. Iowa District Court for Polk County, 765 NW2d 267 (Iowa 2009)

Weigel v. Weigel, 467 NW2d 277 (Iowa 1991)

Kufer v. Carson, 230 NW2d 500 (Iowa 1979)

Mathias v. Glandon, 448 NW2d 443 (Iowa 1989)

Brown v. District Court of Webster County, 158 NW 2d 744 (Iowa 1968)

First Amendment, Constitution of the United States

Article I, Section 7 Constitution of the State of Iowa

Bertrand v. Mullin, 846 NW2d 884 (Iowa 2014)

STATEMENT OF THE CASE

A. Nature of the Case

This is an appeal from a Ruling on Remand after an earlier reversal of a Trial Court's decision to impose approximately \$145,000.00 as a sanction under Iowa Rule of Civil Procedure 1.413. Upon remand the Trial Court considered a post-appeal letter that the sanctioned litigant wrote to the Supreme Court of Iowa expressing the litigant's frustration with the judicial process and thereafter reinstated the full amount of the sanction.

The \$145,000.00 sanction represented the entire cost of First American Bank's and CJ Land's legal expenses in the underlying litigation even though the vast majority of these expenses was unrelated to Fobian Farm's sanctionable claim, Fobian Farms was awarded monetary damages for what was found to be an encroachment on its property, and no unfounded claim was even filed against First American Bank.

Appellants Fobian Farms, Inc., Hoover Highway Business Park, Inc., Gateway, LTD., and Gateway Properties, LTD. ("Fobian Farms") have appealed this sanction award.

B. Course of Proceedings

Plaintiffs First American Bank and C.J. Land, LLC. (“C.J. Land”) filed their petition seeking to quiet title and reform instruments on March 7, 2012. An Amended Petition was filed on April 9, 2012. (Amended Petition; Appendix P. 25) Fobian Farms, Inc., Hoover Highway Business Park, Inc., Gateway Ltd., and Gateway Properties Ltd. (“Fobian Farms”) were named Defendants and filed their answer on May 3, 2012. The other Defendants named in the Petition were Gateway Commercial Condominium Owners Association, Jerry L. Eyman, and Jan G. Eyman.

Fobian Farms’ answer contained a counterclaim alleging that C.J. Land interfered with a prospective business advantage, a cross claim asserting negligent misrepresentation against Jerry Eyman, a cross claim against Gateway Commercial Condominiums Owners Association alleging interference with a prospective business advantage, and a third party claim against Hills Bank alleging negligent misrepresentation. (May 3 Answer; Appendix P. 47) No counterclaim was filed against First American Bank.

There has been no allegation by Hills Bank, Jerry Eyman, or Gateway Commercial Condominium Owners Association that the claims filed against these parties were in any way sanctionable.

C.J. Land and Hills Bank filed summary judgment motions. On January 24, 2013 Fobian Farms' counterclaim against C.J. Land and their third party claim against Hills Bank were dismissed by these motions. (January 24, 2013 Ruling; Appendix P. 56) Thereafter no attempt was made by Fobian Farms to reargue these claim or to pursue them on appeal.

The matter proceeded to a bench trial. The Trial Court entered its ruling granting Plaintiffs their requested relief on August 28, 2013. This ruling also awarded money damages to Fobian Farms for the encroachment of C.J. Land's building on what was found to be Fobian Farms' property. (August 28, 2013 Ruling; Appendix P. 69) Timely motions to amend and enlarge the Trial Court's ruling were filed as was an application for attorney fees and expenses by First American Bank and C.J. Land. This application was resisted by Fobian Farms. (Application for Sanctions; Appendix P. 79; Resistance to Sanctions; App. P. 129)

On February 11, 2014 the Trial Court entered its final order in two parts and ordered reformation, denied the motions to expand, and assessed attorney fees and expenses of approximately \$145,000.00 against the Fobian Defendants as a sanction under Rule 1.413. (February 11, 2014 Orders; Appendix P. 132)

Following an appeal by Fobian Farms the Iowa Court of Appeals affirmed on the reformation issue but reversed and remanded on the sanctions issue. The Appeals Court instructed the Trial Court on remand to make specific findings on the issue of ability to pay and the minimum needed to deter. It also directed the Trial Court to consider the other circumstances of the case, including the fact that time and expense would have been spent on this case by C.J. Land regardless of the claims filed by Fobian Farms, that the case resulted in Fobian Farms being awarded damages and that not all of Fobian Farms' claims were directed at C.J. Land. (Appellate Decision P. 23-24, App. P. 299-300)

On January 15, 2016 the Trial Court ordered briefing on the sanctions issue and the parties each provided the court with the same.

On March 30, 2016 the Trial Court entered its Ruling on Remand which reinstated the full amount of the sanctions. (Ruling on Remand, App. P. 451)

Fobian Farms thereafter timely appealed the Ruling on Remand. (Notice of Appeal, App. P. 458)

C. Statement of Facts

Fobian Farms in no way seeks to reargue the reformation issue but they also believe that an understanding of the complicated circumstances which resulted in the initial litigation is essential. This litigation was a lawsuit brought by C.J. Land and First American Bank seeking to quiet title and reform deeds

and mortgages involving property in a commercial condominium development. Fobian Farms and multiple other parties were named as Defendants. The condominium development was created in 1999 and is known as The Gateway Commercial Condominiums (“Gateway Condominiums”). The declaration of condominium for Gateway Condominiums was duly recorded on February 5, 1999 in Book 2672, Page 212 in the Johnson County Recorder’s Office and included a site plan showing the location of the various units which made up the development. (Transcript P. 69-73¹, Appendix P. 247-249; Exhibit 3 (Page 45 of 65), Appendix P. 182)

At the core of this dispute were Units 2A and 2B. As originally designed in 1999 Unit 2A was located to the west of Unit 2B with a common parking area to the south. (Transcript P. 76, Appendix P. 250; Exhibit 3, P. 45 of 65, Appendix P. 182)

In 2007 a revised site plan for Gateway Condominiums was prepared which changed the location of Units 2A and 2B to a north-south orientation instead of an east-west orientation. Under this new site plan Unit 2B was located directly north of Unit 2A and the parking area was moved to the east of these two units. This 2007 site plan was duly approved by county officials, stamped

¹ Reference to “Transcript” refer to the transcript filed in Appeal No. 14-0309. There were no recorded hearings following the remand.

accordingly, and filed of record with the Johnson County Recorder's office on May 31, 2007 in Plat Book 52, Page 49 of the public records. On its face this 2007 site plan unambiguously states that it supersedes the previous site plan. (Exhibit 4, Appendix P. 203)

The developer of Gateway Condominiums was Gateway, Ltd., an Iowa corporation ("Gateway"). Its lender was Hills Bank and Trust Company ("Hills Bank"), which was the mortgagee of a September, 2003 \$843,071.58 mortgage and a February, 2007 \$624,596.71 mortgage granted to it by Gateway which encumbered portions of The Gateway Condominiums. Both of these mortgages were duly recorded. (Exhibit 7 and 8, Appendix P. 204)

Fobian Farms had no involvement in the initial development or funding of Gateway Condominiums. However in May of 2007 Fobian Farms acquired a mortgage on all of the Gateway Condominiums project still owned at that time by Gateway. This mortgage was security for approximately \$430,000 of preexisting debt owed to Fobian Farms by Gateway and Jerry and Jan Eyman, the principals behind Gateway. Fobian's mortgage was dated May 8, 2007, was recorded May 16, 2007, and therefore was junior to the liens of the two previously recorded Hills Bank mortgages. (Transcript P. 229-230, Appendix P. 254; Exhibit 8, P. 3, Appendix P. 213) Each of these three mortgages was recorded prior to the 2007 change in the site plan.

In 2008 C.J. Land became interested in purchasing a location in Gateway Condominiums on which to build a restaurant. In June of 2008 C.J. Land received a deed from Gateway which conveyed Unit 2B. As explained above Unit 2B under the amended and recorded 2007 site plan is the northerly portion of Unit 2 and Unit 2A is the southerly portion. Under the original 1999 site plan Unit 2B was the easterly of the two units. (Transcript P. 91-92, Appendix P. 252; Exhibit 11, Appendix P. 222)

C.J. Land obtained partial mortgage releases from Hills Bank and Trust Company which released Unit 2B from the liens of the Hills Bank mortgages. (Transcript P. 87-88, Appendix P. 251; Exhibit 10, Appendix P. 220) And it granted a mortgage on Unit 2B to First American Bank. (Transcript P. 93-94, Appendix P. 253; Exhibit 12, Appendix P. 224)

C.J. Land also needed a mortgage release from Fobian Farms in order to have clear title to the property it was purchasing. On this point there was a sharp difference in the testimony. Eyman testified that he told Fobian that the building was going to be built on the southerly location. Carl Fobian, the president of Fobian Farms, disputed this and testified that Jerry Eyman told him that the building was going to be built on the north portion of the Unit 2 property. (Tr. P. 234-236, 605-611, 675-676, App. P. 255-256, 267-270, 276)

C.J. Land began to plan and construct its restaurant building. For some reason it designed and built its building to be one foot too big for the condominium unit it purchased. Further, a large meat smoker and air conditioners were also installed outside the footprint of the unit. (Transcript P. 458-460, Appendix P. 263-264; Exhibit 19, Appendix P. 237; Exhibit 4, Appendix P. 203)

One fact is very clear: C.J. Land did not build in a proper location under either the original 1999 site plan or under the amended 2007 site plan. Its deed conveyed Unit 2B to it. Under the original 1999 site plan both Unit 2A and Unit 2B were well north of where the restaurant was actually built. And under the amended 2007 site plan C.J. Land's restaurant, except for a one-foot encroachment, was constructed south of Unit 2B. (Exhibit 3, 4 and 19, Appendix P.138, 203, and 237)

Meanwhile Gateway defaulted under its two senior mortgages to Hills Bank, which started foreclosure. Since Fobian Farms held a junior mortgage on the property it was named as a defendant in this foreclosure action. During the course of this foreclosure Fobian Farms purchased for approximately \$525,000.00 and received an assignment of Hills Bank's mortgages to prevent the junior mortgage Fobian Farms held from being foreclosed. This brought to approximately \$1,000,000.00 the money which was owed to Fobian Farms and

secured by the mortgages it held. (Transcript P. 614-616, Appendix P. 271-272; Exhibit 13 and 38, Appendix P. 229 and 239)

Before Fobian Farms acquired the Hills Bank mortgages Carl Fobian and his attorney reviewed the 2007 site plan which showed the north-south orientation of Unit 2 and had access to assessor's records showing the location of the restaurant. They factored in the value of the restaurant building in calculating what to pay to acquire the two Hills Bank mortgages. Fobian Farms would not have paid \$525,000.00 to acquire the Hills Bank mortgages if the restaurant was not encumbered by these mortgages. (Transcript P. 548-550, 624-628, Appendix P. 265-266, 273-275)

After this assignment Fobian Farms was substituted as Plaintiff in the foreclosure, the foreclosure was concluded, and on July 6, 2010 Fobian Farms acquired ownership of the portion of Gateway Condominiums formerly owned by Gateway, including Unit 2A, by sheriff's deed. By this deed Fobian Farms for the first time became a titleholder of property in Gateway Condominiums, having previously only been the holder of the two mortgages originally granted to Hills Bank and the one mortgage granted to Fobian Farms. (Exhibit 14, Appendix P. 232)

Fobian Farms promptly called the building encroachment issue to the attention of C.J. Land after it acquired title. (Exhibit 43, Appendix P. 245) In

response Jerry Eyman contacted the surveyors who prepared the amended site plan. These surveyors then prepared a scrivener's affidavit stating that they made a mistake when they prepared the 2007 amended site plan and that references to Unit 2B on this plan were intended to refer to Unit 2A, and vice-versa. At this time Mr. Eyman did not inform the surveyors that Fobian's sheriff's deed had already been recorded and that Gateway no longer owned the property. (Exhibit 17, Appendix P. 234) After Carl Fobian informed the surveyors of the sheriff's deed and threatened litigation the surveyors filed a second affidavit withdrawing their earlier affidavit and explaining that if they had known that Fobian Farms' deed had been recorded they would not have provided the earlier affidavit. (Exhibit 18, Appendix P. 235) A surveyor further testified at trial that they did not make any error and prepared the 2007 site plan exactly as they intended, consistent with local custom, and as requested by realtors. (Transcript P. 374-379, 393-394, Appendix P. 257-260, 261)

Thereafter Johnson County billed Fobian Farms for the property taxes for the restaurant site and building and Fobian Farms paid approximately \$36,000.00 for the same. Likewise Johnson County billed C.J. Land for the property taxes on the unimproved northerly unit and C.J. Land paid these taxes. (Transcript P. 449-450, Appendix P. 262)

D. Routing Statement

This matter involves important questions regarding the extent a trial court can go to assess sanctions, including determining whether a post-trial letter written to the Iowa Supreme Court expressing disappointment and frustration, but not libelous, threatening, or even disrespectful, can properly be considered grounds for sanction under Iowa Rule of Civil Procedure 1.413. Because of the importance and novelty of this issue this appeal should be retained by the Iowa Supreme Court.

ARGUMENT

I. THE TRIAL COURT ERRED IN DETERMINING THE AMOUNT OF THE SANCTION TO BE ASSESSED AGAINST THE FOBIAN DEFENDANTS

A. Standard of Review and Issue Preservation. A Trial Court's determination regarding sanctions is reviewed for an abuse of discretion. An erroneous application of law is an abuse of discretion. Rowedder v. Anderson, 814 NW2d 585, 589 (Iowa 2012). An abuse of discretion also occurs when a district court exercises its discretion on grounds which are untenable, clearly unreasonable or which are not supported by substantial evidence. Schettler v. Iowa District Court, 509 NW2d 459, 464 (Iowa 1993).

Following the earlier reversal the Trial Court issued a briefing schedule, which the parties complied with. No further hearing was held. Error on the issues of the amount of sanctions and what should be considered in assessing these sanctions was preserved in Fobian Farms' brief. (Fobian Farms Brief on Sanctions)

B. Argument.

1. *The Trial Court erred in concluding that the entire amount of C.J. Land's and First American Bank's litigation expenses was recoverable.* At the outset it is important to recognize that Fobian Farms were Defendants in this lawsuit and did not commence the litigation. And it is also clear that there were numerous other Defendants sued by C.J. Land who had no connection with Fobian Farms and who also actively defended against C.J. Land's claims throughout the litigation process, including participating at the trial. For example, Defendant Gateway Commercial Condominium Owners Association filed a Motion to Dismiss the Petition and Defendants Jerry Eyman and Jan Eyman filed a Motion for Judgment on the Pleadings. These actions were vigorously resisted by C.J. Land. (Docket Entries, App. P. 1) C.J. Land therefore required extensive legal services and would have incurred significant legal expenses regardless of the counterclaim filed by Fobian Farms which was found to be sanctionable. And once this counterclaim was dismissed on summary judgment neither it nor any

other affirmative defenses or claims were filed by Fobian Farms against CJ Land. Further, First American Bank, a named Plaintiff, was not even named in the counterclaim filed by Fobian but yet had all its litigation expenses reimbursed to it through the sanctions award. These are important facts, because a Trial Court abuses its discretion if as a sanction under Rule 1.413 it awards fees which are not related to the frivolous pleading. Rowedder v. Anderson, 814 NW2d 585, 590 (Iowa 2012); Everly v. Knoxville Community School District, 774 NW2d 488, 495 (Iowa 2009). See, also Bodenhamer Bldg. Corp. v. Architectural Research Corp., 989 F.2d 213, 218 (6th Circ. 1993); In Re. Kunstler, 914 F.2d 505, 523 (4th Circ. 1990); Mark S. Cady, Curbing Litigation Abuse and Misuse: A Judicial Approach, 36 Drake L. Rev. 483, 506 (1986-87).

The conclusion that only those fees associated with responding to the unfounded pleading are properly assessed as a sanction is also required by the clear language of Rule 1.413, which states in relevant part:

If a motion, pleading, or other paper is signed in violation of this rule, the court, upon motion or upon its own initiative, shall impose upon the person who signed it, a represented party, or both, an appropriate sanction, which may include an order to pay the other party or parties the amount of the reasonable expenses incurred because of the filing of the motion, pleading, or other paper, including a reasonable attorney fee. (emphasis added)

In its earlier opinion the Iowa Court of Appeals recognized this and directed the Trial Court on remand to reconsider the sanctions award in light of

the facts that (a) time and legal expense would have been spent by C.J. Land and First American Bank in pursuing their own reformation and quiet title claims regardless of the counterclaim filed by Fobian Farms, (b) that the underlying case resulted in damages being awarded to Fobian Farms for what was found to be a trespass on Fobian Farms' property, and (c) that not all Fobian Farms' claims were sanctionable or directed at C.J. Land. (Appellate Decision P. 23-24, App. P. 299-300) The Trial Court on remand, however, simply reinstated the full amount of the sanction, including the portion of the sanction which represented legal expenses not related to Fobian Farm's unfounded pleading.

Under the above authorities only C.J. Land's attorney fees relevant to defending against the counterclaim during the time period of May 3, 2012 (the date of Fobian's Answer and Counterclaim) to January 23, 2013 (the date of dismissal of this counterclaim) should be considered as a possible sanction. Further, since First American Bank was not the subject of any unfounded pleading none of the cost of its legal services should be included in the sanction amount. Accordingly the District Court abused its discretion when on remand it erroneously applied the law and ruled that all legal expenses are reimbursable even though most of these expenses had no connection with the sanctioned pleading.

C.J. Land at trial and again on remand failed to present evidence as to the amount of expenses it incurred defending against the sanctioned counterclaim, arguing instead that all its expenses for the entire litigation as well as all of First American Bank's expenses should be assessed against Fobian Farms. First American Bank and C.J. Land were represented by the same counsel, whose redacted statements are in the record. These show all legal expenses incurred during the time period between the May 3, 2012 date of filing the counterclaim and the January 24, 2013 date of its dismissal. However, they fail to clearly distinguish between expenses related to the sanctionable conduct and non-related expenses and also fail to distinguish which work was done for First American Bank and which was done for C.J. Land. The undersigned's review of these bills, however, indicates that no more than 15 hours of time and \$3,750.00 in legal expenses was spent defending against the counterclaim. (Redacted Legal Bills, App. P. 89) This \$3,750.00 should therefore be seen as the maximum amount which should be assessed as a sanction.

The Trial Court also failed to consider all of the ABA factors discussed in Barnhill. These factors, with Fobian Farms' analysis of the same shown bracketed in italics, are:

a, b. the good faith or bad faith of the offender;

the degree of willfulness, vindictiveness, negligence or frivolousness involved in the offense; [*Fobian concedes that it was*

unable to identify a specific business opportunity which it lost but also respectfully points out that it was in the business of selling real estate.]

c. the knowledge, experience and expertise of the offender; *[The offender is not an attorney.]*

d. any prior history of sanctionable conduct on the part of the offender; *[None]*

e. the reasonableness and necessity of the out-of-pocket expenses incurred by the offended person as a result of the misconduct; *[The expenses incurred as a result of the unfounded pleading did not exceed \$3,750.00.]*

f. the nature and extent of prejudice, apart from out-of-pocket expenses, suffered by the offended person as a result of the misconduct; *[No prejudice other than legal expenses.]*

g. the relative culpability of client and counsel, and the impact on their privileged relationship of an inquiry into that area; *[The counterclaim was found to be unfounded because of the lack of evidence of an identifiable buyer, which to a layman is a somewhat technical requirement.]*

h. the risk of chilling the specific type of litigation involved; *[Very high, as the sanction awarded includes reimbursement for expenses unrelated to the sanctioned filing.]*

i. the impact of the sanction on the offender, including the offender's ability to pay a monetary sanction; *[The sanction award far exceeds the cost of expenses incurred and makes it responsible for all litigation expenses.]*

j. the impact of the sanction on the offended party, including the offended person's need for compensation; *[The sanction award reimbursed all legal expenses, which is excessive, and also reimbursed First American Bank, who was not even named in the pleading.]*

k. the relative magnitude of sanction necessary to achieve the goal or goals of the sanction; *[Believed to be low, as there is no history of misconduct.]*

l. burdens on the court system attributable to the misconduct, including consumption of judicial time and incurrence of juror fees and other court costs; *[Summary judgment hearing and decision was required but no other court time needed.]*

m. the degree to which the offended person attempted to mitigate any prejudice suffered by him or her; *[No known attempt to mitigate.]*

n. the degree to which the offended person's own behavior caused the expenses for which recovery is sought; *[Litigation was necessary in any event because of the encroachment caused by C.J. Land and the preexisting title issues.]*

o. the extent to which the offender persisted in advancing a position while on notice that the position was not well grounded in fact or warranted by existing law or a good faith argument for the extension, modification or reversal of existing law; *[The sanctioned counterclaim was abandoned after summary judgment and not appealed.]*

p. the time of, and circumstances surrounding, any voluntary withdrawal of the pleading, motion or other paper. *[Not applicable.]*

What the Trial Court in essence did in this case was to determine that Fobian Farms' decision to defend themselves against C.J. Land's claim was itself sanctionable conduct under Rule 1.413 and that this decision also demonstrated a need for a substantial sanction amount as being the minimum necessary to deter. (Ruling on Remand P. 5, App. P. 455) This conclusion is an erroneous application of law because Rule 1.413 and other Iowa law does not permit a

sanction for defending against a claim but instead only sanctions unfounded or otherwise improper pleadings. See, Barnhill, 765 NW2d at 273; Bodenhamer, 989 F.2d at 218. Once the summary judgment order disposed of Fobian Farms' interference claim there were no remaining pled claims or affirmative defenses of Fobian Farms against C.J. Land. Accordingly C.J. Land should bear the full cost of pursuing its own claims after the summary judgment decision. And since no claims were ever filed against First American Bank, none of its expenses should be included in the sanction award.

It should also be noted that Fobian Farms' defense was not a "scorched earth" type of defense. Instead Fobian Farms' Answer admitted approximately one-half of the allegations of the Petition, thereby substantially reducing the scope of the litigation. (Answer, App. P. 47)

And, in addition to holding its own mortgage, Fobian Farms held by valid assignment the two senior mortgages originally granted to Hills Bank. There was no clear evidence that Hills Bank ever intended to release the south lot where the restaurant was built from these two mortgages. It was therefore in no way improper for Fobian Farms as assignee to resist C.J. Land's claims that these liens did not affect the restaurant building.

Finally, Fobian Farms' decision to defend itself resulted in Fobian Farms being awarded damages for the encroachment on its property. As recognized in the earlier Appellate Decision choosing to defend oneself in a case where your property rights are found to have been violated should not be sanctionable and does not support a finding that deterrence is needed. Indeed, doing so would unmistakably chill a litigant from pursuing his right to assert a defense even if this defense had merit. The District Court on remand therefor erred when it did so.

The District Court also erred by determining that Fobian Farms' had improper intentions in defending against the lawsuit. Specifically, the Trial Court ruled that Fobian Farms was "trying to get a free restaurant". (Ruling on Remand P. 5, App. P. 455) In doing so, the Trial Court acted contrary to the decision in Weigel v. Weigel, 467 NW2d 277, 282 (Iowa 1991) where it was determined that the subjective intentions of a litigant are not to be considered in assessing sanctions. Instead, the test as to whether sanctions are proper is an objective one. In the present case it was reasonable for Fobian Farms to defend itself, as the damage award in its favor demonstrates. Further, the reformation relief requested by C.J. Land is never given as a matter of right but is always discretionary. Kufer v. Carson, 230 NW2d 500, 503 (Iowa 1979). If the relief requested is discretionary, why should a defendant not be able to defend itself and explain its

position as to why this discretion should not be exercised? This particularly applies to a case such as this one where Plaintiffs' building was intentionally built too big to fit on their lot and this lot's location and ownership were not clearly established by the existing recorded documents.

Finally, the District Court considered what it found to be improper pretrial conduct of Fobian Farms, including the "bullying" of surveyors and the failure to notify C.J. Land that C.J. Land was building on the wrong lot. (Ruling on Remand P. 5-6, App. P. 455-456) However, conduct which occurred prior to the sanctionable pleading is not itself sanctionable under Rule 1.413 and it is an abuse of discretion to do so. Likewise, conduct which occurs after an unfounded claim is dismissed, including the letter Fobian Farms wrote to The Iowa Supreme Court, should also not be considered. See, Everly, 774 NW2d at 495; Mathias v. Glandon, 448 NW2d 443, 447 (Iowa 1989).

What the Trial Court should have done in this case is to determine the amount of legal expenses incurred as a result of the sanctionable counterclaim. Instead the Trial Court abandoned the American Rule regarding fees and instead shifted the entire obligation for the same to the losing party in the litigation. This abandonment of the American Rule is particularly evident in light of the Trial Court's decision to include the cost of First American Bank's legal expenses in the sanction award even though First American Bank was not even named in the

unfounded counterclaim and therefore had no need to respond to the same. This sort of fee shifting of the entire litigation cost is not proper under Rule 1.413. Accordingly, the Trial Court abused its discretion when it did so. Rowedder, 814 NW2d at 589.

2. *The Trial Court made findings in support of sanctions which were not supported by substantial evidence.* In its Ruling on Remand the District Court found certain facts which are not supported by substantial evidence:

a. The Trial Court found that Fobian Farms continued to question or challenge valid court orders after the dismissal of its counterclaim. (Ruling on Remand P. 6, App. P. 456) As explained above, however, once the summary judgment ruling was entered Fobian Farms discontinued its claims and did not appeal this decision. From that point onward it only defended itself against C.J. Lands' claims. Further, as explained below the letter written by Carl Fobian, although it expressed frustration with the judicial process and disappointment at the outcome, did not challenge or defy any courts order or attempt to relitigate any issues.

b. The Trial Court found that Fobian Farms delayed the court process by filing their claims. (Ruling on Remand P. 5, App. P. 455) However, the claims of Fobian Farms against C.J. Land were dismissed well prior to trial by a relatively brief and straight forward summary judgment proceeding. And

there was no claim by any of the other Defendants that any of the claims raised by Fobian Farms were unfounded. Accordingly there is no factual basis for the conclusion that the counterclaim delayed the judicial process. Indeed, Fobian Farms' answer admitted many of the allegations of the Petition, thereby limiting the issues and shortening the judicial process. (Answer, App. P. 47)

c. The Trial Court found that "numerous parties were required to be brought into this case." (Ruling on Remand P. 4, App. P. 454) This finding is not supported by substantial evidence as the only party brought into this action because of Fobian's claim was Hills Bank. All other litigants were sued by C.J. Land and First American Bank. Further, on remand C.J. Land made no claim that Fobian Farms' claims against Hills Bank and the defendants other than itself in any way affected it or required C.J. Land or First American Bank to take any action on to incur any expense. And C.J. Land is the only party who has claimed that Fobian Farms made a frivolous filing or who has requested sanctions.

d. The Trial Court found that Fobian Farms "tried to get a free restaurant." (Ruling on Remand P. 5, App. P. 455) However, the undisputed facts are that Fobian Farms paid Hills Bank \$525,000.00 to acquire the two mortgages Hills Bank held and which Fobian Farms foreclosed. (Tr. P. 548-550, 624-628, App. P. 265-266, 273-275) Accordingly Fobian Farms in defending against C.J.

Land's claims was not trying to get a free restaurant but was instead defending the mortgage liens which it purchased from Hills Bank at a considerable price.

e. The Trial Court found that all of C.J. Land's litigation expenses were reasonable. (Ruling on Remand P. 4-5, App. P. 454-455) But this is not the correct standard. Instead, the Trial Court must make a determination as to the amount of fees attributable to the sanctioned filing and then determine whether these limited fees are reasonable. Rowedder v. Anderson, 814 NW2d 585, 590 (Iowa 2012); Everly v. Knoxville Community School District, 774 NW2d 488, 495 (Iowa 2009). See, also Bodenhamer Bldg. Corp. v. Architectural Research Corp., 989 F.2d 213, 218 (6th Circ. 1993); In Re. Kunstler, 914 F.2d 505, 523 (4th Circ. 1990); Mark S. Cady, Curbing Litigation Abuse and Misuse: A Judicial Approach, 36 Drake L. Rev. 483, 506 (1986-87).

The Court of Appeals instructed the Trial Court on remand to reconsider the sanctions amount in light of the fact that only some of the claimed attorney fees related to the unfounded pleading. (Appellate Decision P. 23-24, App. P. 299-300) Because the Trial Court therefor failed to make such a finding even though it was directed to do so and because there was not substantial evidence supporting the material findings which were made, the Trial Court abused its discretion when it reinstated the full sanction amount. Schettler v. Iowa District Court, 509 NW2d 459, 464 (Iowa 1993).

3. *The Trial Court erroneously calculated the amount that was needed to deter.* Fobian Farms contends that the Trial Court abused its discretion when it determined that the \$145,000.00 assessed against it was the minimum needed to deter. First, \$145,000.00 is a massive sanction and is far in excess of what C.J. Land spent in obtaining a dismissal of the sanctionable counterclaim. This amount is also much greater than the fraction of defense costs which has been found to be sufficient in other Iowa cases. See, Barnhill, (sanction of \$25,000.00 when defense costs were \$148,596.34); Rowedder, (\$1,000.00 sanction when defense costs were \$63,926.00). Second, there is no claim that Fobian Farms has a history of filing unfounded claims.

Fobian Farms also respectfully contends that its own financial loss should be considered in calculating what is needed to deter. For example, in addition to the \$525,000.00 it paid to Hills Bank for its mortgages, Fobian Farms paid over \$36,000.00 in property taxes on the restaurant property. This amount directly benefited C.J. Land which otherwise would have been required to pay the same. This amount alone far exceeds the amount of expense incurred by C.J. Land in defending against Fobian Farms' counterclaim.

For the above reasons the Trial Court acted contrary to law and otherwise abused its discretion in determining the sanction amount.

4. *The Trial Court improperly considered the letter written by Fobian.* In a post appeal letter received by The Iowa Supreme Court on August 21, 2015 Carl Fobian expressed disappointment and frustration at the litigation process and in the result of the same. This letter was not written to the Trial Court and was sent after the Supreme Court denied further review of the initial appeal. This letter was not libelous, threatening, profane, obscene, or blatantly disrespectful. Nor did it ask the Supreme Court to take any further action on the case. Perhaps most importantly the letter contains no indication or threat of any further litigation.

Nevertheless the Trial Court concluded that this letter demonstrated a strong need to deter further conduct by Fobian Farms which violates Rule 1.413.

Because the letter contains no threat of further litigation and no indication that the court's decision would not be respected it does not provide substantial support for the conclusion that a large sanction is necessary to deter future sanctionable conduct. Accordingly it was an abuse of discretion to determine otherwise. See, Schettler v. Iowa District Court, 509 NW2d 459, 464 (Iowa 1993).

Further, the Iowa Supreme Court has specifically ruled that a letter by a non-attorney litigant criticizing the court process or outcome is neither improper nor sanctionable. See, Brown v. District Court of Webster County, 158 NW 2d

744, 747 (Iowa 1968). Because Fobian's letter was written by a private citizen, does not contain any threats, obscenities, or libelous content, and refers to a governmental process and government officials it should be considered protected free speech, and therefore not evidence of the need for deterrence, under the First Amendment to the United States Constitution and under Article I, Section 7 of the Iowa Constitution. See, Bertrand v. Mullin, 846 NW2d 884, 892-893 (Iowa 2014).

Finally, since the letter was written approximately three years after the filing of Fobian Farms' sanctionable counterclaim and was not part of the record on which the Trial Court based its initial decision it should not now be considered as justification for a large sanction. In ruling otherwise the Trial Court abused its discretion as the grounds for sanction are to be determined as of the date of the unfounded pleading. See, Weigel, 467 NW2d at 280-281.

When all of the above factors are considered, the amount needed to deter Fobian Farms does not exceed \$1,000.00.


CONCLUSION

The judgment of the Trial Court regarding sanctions should be reversed, the amount of the sanction awarded should be limited to no more than \$1,000.00, and the costs of this appeal should be assessed against C.J. Land.

REQUEST FOR ORAL ARGUMENT

Appellants request to be heard at oral argument in this matter.

Respectfully Submitted,

BY: 

GREGG GEERDES
Dey Building
105 Iowa Avenue, Suite 234
Iowa City, Iowa 52240
(319) 341-3304 Telephone
(319-341-3306) Fax

ATTORNEY FOR APPELLANTS

CERTIFICATE OF COMPLIANCE

1. This brief complies with the type-volume limitation of Iowa R. App. P.

6.903(1)(g)(1) or (2) because:

☒ this brief contains 6,339 words, excluding the parts of the brief exempt by Iowa R. App. P. 6.903(1)(g)(1) or

☐ this brief uses a monospaced typeface and contains _____ lines of text, excluding the part of the brief exempted by Iowa R. App. P. 6.903(1)(g)(2).

2. This brief complies with the typeface requirements of Iowa R. App. P.

6.903(1)(e) and the type-style requirements of Iowa R. App. P. 6.903(1)(f)

because:

☒ this brief has been prepared in a proportionally spaced typeface using Microsoft Word 2013 in size 14 Times New Roman type face, or

☐ this brief has been prepared in a monospaced typeface using size _____ with _____ typeface.

Signature

Date